

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1108 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

RAFIK HABIB MEMON

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1108 of 2000
MR MIG MANSURI for Appellant
MR IM PANDYA, APP for Respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 21/06/2004

ORAL JUDGEMENT

This appeal has been preferred by the appellant-original accused under Sec.374(2) of the Code of Criminal Procedure, 1973 against the judgment and order dated 18-11-2000 passed by the learned Additional Sessions Judge, Morbi, in Sessions Case No.49 of 1991 whereby he has been sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.5,000/-, in default, to suffer further rigorous imprisonment for six months, for the offence punishable under Sec.376 of Indian Penal Code.

2. The case of the prosecution is that on 6-2-1991 when the mother and sister of complainant victim went for labour work in the market by telling the victim to bring some vegetable from the market, she went to the market and stood there near a neem tree. As planned before two days, the appellant came there and told the victim to go to the street behind the Government hospital. She went there and the appellant also followed her where the appellant allegedly raped the victim in the street itself by administering threat. The victim was asked not to disclose the incident to anybody. Thereafter, the victim went home, waited till the evening for her mother. When her mother came from the work place, she informed her about the incident. Since her father was not at home, they waited for him. Thereafter, she went to Morbi City Police Station with her mother where she narrated the incident and in turn, her complaint was recorded by the concerned Police Officer for the alleged commission of offence punishable under Secs.376 and 506(2) of the Indian Penal Code which was registered as Morbi City Police Station Crime Register No.I-28 of 1991.

2.1 Upon registration of the offence, the investigating agency started investigation into the matter and during the course of the same, the appellant was arrested. The victim and the appellant were sent for medical examination and the accused was sent into judicial custody. The investigating agency recorded the statements of various witnesses, collected various documents and at the end of investigation, submitted charge-sheet against the appellant.

2.2 As it was a sessions triable case, the concerned learned Magistrate committed it into the Court of Sessions where it was numbered as Sessions Case No.49 of 1991. Charge was framed against the appellant for the offences under secs.376 and 506(2) of IPC on 11-1-2000. The appellant pleaded not guilty to the charge and

claimed to be tried.

2.3 To prove the guilt against the accused, the prosecution produced documentary evidence and also examined 11 witnesses in all. The learned Addl. Sessions Judge, Morbi, thereafter, recorded the further statement of the accused under Sec.313 of Cr.P.C. After hearing the learned advocates appearing for the respective parties, the learned Addl. Sessions Judge, Morbi, vide judgment and order dated 18-11-2000 passed in Sessions Case No.49 of 1991 convicted the appellant as aforesaid.

2.4 Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction, the appellant preferred this appeal. At the initial stage, appeal was admitted but bail was refused. However, since it is a short sentence matter, appeal was expedited and listed on the final hearing board of this Court.

3. We have heard learned counsel for the appellant, Mr.M.I.G.Mansuri and learned APP for the State, Mr.I.M.Pandya.

4. Taking us through documentary as well as oral evidence of various witnesses namely, oral evidence of victim Ex.26, FIR Ex.27, medical papers of the victim Ex.42 running from page Nos.219 to 224 of compilation more particularly last page, it is argued by Mr.Mansuri that at the time of incident, victim was aged more than 16 years. He has also taken us through School Leaving Certificate of victim Ex.33 and oral evidence of Principal of concerned School Ex.20 in order to show that birth date of the victim was shown on the basis of Vali Form. However, Vali Form has not been admittedly filled in nor tendered either by the parents or the nearest relative of the victim. It is therefore argued that in absence of any cogent evidence regarding the age of the victim, medical papers of the victim produced at Ex.42 are required to be taken into consideration. According to him, Ex.42 shows the age of victim to be above 16 years. According to him, it was a love affair between the appellant and the victim. In this regard, he has taken us through FIR Ex.23 and oral evidence of the victim including her cross-examination and argued that the victim herself had admitted in her examination-in-chief regarding the love affair and there is no reason to disbelieve her on this point. It is further argued that though this aspect has been considered, trial court came to the conclusion that appellant was required to be convicted under Sec.376(2)

of IP Code as he had a knowledge of the victim being pregnant at the time of incident. According to learned counsel for the appellant, nowhere it has been established by the prosecution that the appellant had a knowledge regarding pregnancy of the victim at the time of incident. On the contrary, it is the say of the victim herself that she had called on the appellant on the day of incident for the purpose of informing him regarding her pregnancy, but before she could inform the same, incident in question has taken place. Hence, according to him, case of the appellant does not fall under Sec.376(2) of IPC. It is ultimately requested that the appellant is a young boy having the liability to maintain his family including ailing mother. In view of the facts that the victim is above 16 years of age and also that the appellant had no knowledge regarding the victim being pregnant apart from the fact that the incident in question has taken place due to the love affair between the appellant and the victim going on since long, it is requested that some mercy be shown to the appellant. Mr.Mansuri, however, has not challenged the conviction but has requested to reduce the sentence awarded.

4.1 He has drawn our attention towards the judgment reported in AIR 1989 S.C. page 937 more particularly head note (B) which reads as under:

"(B) Penal Code (45 of 1860), S.376--Punishment for rape--Peculiar facts and circumstances of case coupled with conduct of girl not calling for minimum sentence of 10 years R.I. as prescribed under S.376(2)--Held, proviso to S.376 could be invoked and sub-minimum sentence of 5 years R.I. would meet ends of justice."

5. Mr.I.M.Pandya, learned APP for the State, has not disputed the admitted facts i.e. oral as well as documentary evidence on record, which have been established during the course of trial. It is contended that looking to the incident in question, the sentence awarded by the court below is just and proper and, therefore, it does not require any interference.

6. It is settled principle of law that statement of victim does not require any corroboration. It is true that the alleged incident in question has taken place in broad-day light in the residential vicinity very near to the hospital. It is clear from the FIR and the deposition of victim that the victim went near the neem tree as was planned before two days of the incident and

she went near to the hospital as decided by her and the victim where the incident has taken place. This shows that there was a love affair between the victim and the appellant since long. This has been so held by the trial court in its judgment. It was held by the trial court that since the appellant had a knowledge of the victim being pregnant at the time of incident, the case falls under Sec.376(2) of IPC. However, as established from the case of the prosecution, the appellant had no knowledge regarding pregnancy of the victim as, according to the victim, before she could inform the appellant regarding her pregnancy, the incident in question has taken place and, therefore, finding of the trial court in this regard is incorrect. Hence, case of the appellant cannot be said to be falling under Sec.376(2).

7. Having regard to the above facts and circumstances of the case, when this Court has come to the conclusion that the case of the appellant does not fall under Sec.376(2) of IP Code and when age of the victim has been taken to be more than 16 years considering the medical papers without there being any other satisfactory documentary evidence on record of her age coupled with the fact that it was a love affair apart from the fact that the conviction has not been challenged by the learned counsel for the appellant, further discussion is not required to be made by us. As we have already stated, the version of the prosecutrix does not require any corroboration. Hence, keeping in mind all the aspects of the matter and the judgment relied upon by the learned counsel for the appellant, sentence is required to be reduced to a certain extent and appeal is required to be partly allowed.

8. This appeal is partly allowed. The sentence awarded by the learned Additional Sessions Judge, Morbi, in Sessions Case No.49 of 1991 on 18-11-2000 on the appellant-original accused to undergo rigorous imprisonment for ten years is reduced to five years for the offence punishable under Sec.376 of Indian Penal Code. Rest of the order will remain unchanged. The appeal is disposed of accordingly.

9. Since this judgment is delivered looking to the peculiar facts and circumstances of the case, same shall not be treated as precedent.

(R.P.DHOLAKIA, J.)

(SHARAD D.DAVE, J.)

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